

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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EASTERN US DISTRICT COURT
NORFOLK, VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 2:06-cv-624

SEA BAY DEVELOPMENT CORP.;
BEECH TREE PARK, INC.; GREEN SEA
FARMS, LLC; ELWOOD H. PERRY;
FRANK T. WILLIAMS' FARMS, INC.;
and FERRELL'S BACKHOE SERVICE,
INC.,

Defendants.

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein against Defendants Sea Bay Development Corp.; Beech Tree Park, Inc.; Green Sea Farms LLC; Elwood H. Perry, Jr.; Frank T. Williams' Farms, Inc.; and Ferrell's Backhoe Service, Inc., alleging that Defendants violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at a 1,560-acre property known as the Bosher Site or Green Sea Farm, located west of Johnstown Road, east of Shillelagh Road, and south of the Whispering Pines subdivision, in Chesapeake, Virginia, ("the Site") and more fully described in

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the Complaint, without authorization by the United States Army Corps of Engineers (“the Corps”);

WHEREAS, the Complaint seeks (1) to permanently enjoin Defendants from discharging or causing the discharge of dredged material, fill material, sediment, and any other pollutants into any waters of the United States except in compliance with the CWA; (2) to require Defendants, at their own expense and at the direction of EPA and/or the Corps, to effect complete restoration of waters of the United States, including wetlands, on the site and/or to conduct off-site mitigation for irreversible environmental damage; and (3) to require Defendants to pay civil penalties for each day of each violation of the CWA, as provided in 33 U.S.C. § 1319(d);

WHEREAS, the Clerk of Court for the United States District Court for the Eastern District of Virginia, Norfolk Division, has entered default against Ferrell’s Backhoe Service, Inc. in this case;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States’ claims under the CWA against Defendants Elwood H. Perry, Jr., and Ferrell’s Backhoe Service, Inc. (collectively “Settling Defendants”) regarding the Site;

WHEREAS, the United States and Settling Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States’ claims under the CWA against Settling Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States’ claims against Settling Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Eastern District of Virginia pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Settling Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations, terms, and conditions of this Consent Decree shall apply to and be binding upon Settling Defendants, their officers, directors, agents, employees and servants, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Settling Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against a Settling Defendant, the Settling Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation

acting in concert or participation with the Settling Defendant, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Site shall not alter or relieve Settling Defendants of their obligation to comply with all of the terms of this Consent Decree.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint, or that could have been alleged in the Complaint, against the Settling Defendants under CWA Section 301 concerning the Site.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All obligations in this Consent Decree or resulting from this Consent Decree shall have the objective of causing Settling Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. Settling Defendants and Settling Defendants' agents, successors and assigns are enjoined from discharging, at or from the Site, any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

9. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any

individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

10. This Consent Decree in no way affects or relieves Settling Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

11. This Consent Decree in no way affects the rights of the United States as against any person or entity not a party to this Consent Decree.

12. The United States reserves any and all legal and equitable remedies available: to enforce the provisions of this Consent Decree; and to enforce applicable law, except for claims resolved by this Consent Decree as set forth in Paragraph 6 above.

13. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. CIVIL PENALTIES

14. Settling Defendants shall pay a civil penalty to the United States in the amount of Sixty-Five Thousand Dollars (\$65,000.00). The payment shall be made by Defendant Elwood H. Perry, Jr., on behalf of Settling Defendants, in two installments. The first installment of Thirty-Two Thousand And Five-Hundred Dollars (\$32,500.00) shall be made not later than 90 days after entry of this Consent Decree. The second installment of Thirty-Two Thousand And Five-Hundred Dollars (\$32,500.00) shall be made not later than 270 days after entry of this Consent Decree. Early payment of one or both installments is permitted.

15. Defendant Elwood H. Perry, Jr., is solely responsible for making the payments, on behalf of Settling Defendants, required by this Consent Decree.

16. Defendant Elwood H. Perry, Jr., shall make the payments set forth in Paragraph 14 above, by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2006V01299, EPA Region III and the DOJ case number (DJ#90-5-1-1-05061). Payment shall be made in accordance with instructions provided to Defendant Elwood H. Perry, Jr., by the Financial Litigation Unit of the United States Attorney’s Office for the Eastern District of Virginia. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon each installment payment of the civil penalty required by this Consent Decree, Defendant Elwood H. Perry, Jr., on behalf of the Settling Defendants, shall provide written notice, to all of the addresses specified in Section VII of this Consent Decree, that such payment was made in accordance with Paragraph 16.

18. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VI) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

V. DISPUTE RESOLUTION

19. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and any Settling Defendant affected by the dispute, to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond twenty (20) days beginning with written notice by one party to the other affected party or parties that a dispute

exists, unless agreed to in writing by those parties. If a dispute between the United States and Settling Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within ten (10) days after the end of the informal negotiations period, the Settling Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have twenty (20) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Settling Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Settling Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

20. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the twenty (20) day period for informal negotiations. The Settling Defendants shall have ten (10) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Settling Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Settling Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

21. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Settling Defendants under this Consent Decree, except as provided in Paragraph 24 below regarding payment of stipulated penalties.

VI. STIPULATED PENALTIES

22. After entry of this Consent Decree, if Settling Defendants fail to timely fulfill any requirement of the Consent Decree, Defendant Elwood H. Perry, Jr., on behalf of the Settling Defendants, shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- | | | |
|----|---|--------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$1000.00 per day |
| B. | For Day 31 up to and including
60 of non-compliance | \$2,000.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$3,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

23. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section V shall be resolved upon motion to this Court as provided in Paragraphs 19 and 20.

24. The filing of a motion requesting that the Court resolve a dispute shall stay Defendant Elwood H. Perry, Jr.'s obligation, on behalf of the Settling Defendants, to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute.

Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendant Elwood H. Perry, Jr., on behalf of Settling Defendants, as provided in this Section.

25. To the extent Settling Defendants prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

26. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

27. Defendant Elwood H. Perry, Jr., on behalf of the Settling Defendants, shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2006V01299, EPA Region III and the DOJ case number (DJ#90-5-I-1-05061). Payment shall be made in accordance with instructions provided to the Defendant Elwood H. Perry, Jr., by the Financial Litigation Unit of the United States Attorney’s Office for the Eastern District of Virginia. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendant Elwood H. Perry, Jr., on behalf of the Settling Defendants, shall provide written notice, at the addresses specified in Section VII of this Consent Decree.

VII. ADDRESSES

28. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Pamela Lazos
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch St., Mail Code 3RC20
Philadelphia, PA 19103-2029
- (2) Jeffrey Lapp
United States Environmental Protection Agency
Region III
1650 Arch St., Mail Code 3EA31
Philadelphia, PA 19103-2029
- (3) April Bowie, Docket Clerk
United States Environmental Protection Agency
Region III
1650 Arch St., Mail Code 3RC00
Philadelphia, PA 19103-2029

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Kenneth C. Amaditz, Trial Attorney
Cynthia J. Morris, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

C. TO SETTLING DEFENDANTS:

- (1) Elwood H. Perry, Jr.
2875 Forge Road
Toano, VA 23168

- (2) Samuel W. Meekins
Wolcott Rivers Gates
One Columbus Center, Suite 1000
Virginia Beach, VA 23462
Counsel for Defendant Elwood H. Perry, Jr.
- (3) Pamela Ferrell
Ferrell's Backhoe Service, Inc.
1160 Chapanoake Rd.
Hertford, NC 27944
- (4) L. Phillip Hornthal, III
Hornthal, Riley, Ellis & Mayland LLP
P.O. Box 220
Elizabeth City, NC 27907-0220
Counsel for Defendant Ferrell's Backhoe Service, Inc.

VIII. COSTS OF SUIT

29. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Settling Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendant Elwood H. Perry, Jr., on behalf of Settling Defendants, shall be liable for any costs or attorneys' fees incurred by the United States in any action against Settling Defendants for noncompliance with or enforcement of this Consent Decree.

IX. PUBLIC COMMENT

30. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is

inappropriate, improper, or inadequate. The Settling Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

X. CONTINUING JURISDICTION OF THE COURT

31. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XI. MODIFICATION

32. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Settling Defendants and approved by the Court.

XII. TERMINATION

33. This Consent Decree may be terminated by either of the following:

A. Settling Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Settling Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendant Elwood H. Perry, Jr., on behalf of Settling Defendants, has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
2. Settling Defendants have certified compliance pursuant to subparagraph 1 and above to the Court and all parties; and
3. Within forty-five (45) days of receiving such certification from the Settling Defendants, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Settling Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the parties or the Court.


IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2007.

United States District Judge

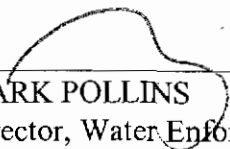
ON BEHALF OF THE UNITED STATES:

RONALD J. TENPAS
Acting Assistant Attorney General
Environment and Natural Resources Division



Kenneth C. Amaditz, Trial Attorney
Cynthia J. Morris, Trial Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-3698 (Amaditz)
(202) 616-7554 (Morris)

Dated: 10/25/07



MARK POLLINS
Director, Water Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Dated: 10/17/07

DONALD S. WELSH
Regional Administrator
U.S. Environmental Protection Agency, Region III

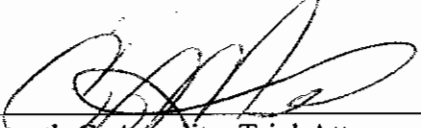
Dated: _____

WILLIAM C. EARLY
Regional Counsel
U.S. Environmental Protection Agency, Region III

Dated: _____

ON BEHALF OF THE UNITED STATES:

RONALD J. TENPAS
Acting Assistant Attorney General
Environment and Natural Resources Division



Kenneth C. Amaditz, Trial Attorney
Cynthia J. Morris, Trial Attorney
Environmental Defense Section
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P.O. Box 23986
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(202) 514-3698 (Amaditz)
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Dated: 10/25/07

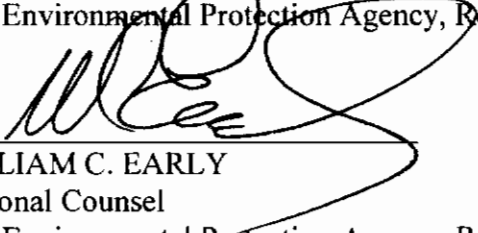
MARK POLLINS
Director, Water Enforcement Division
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Dated: _____



for DONALD S. WELSH
Regional Administrator
U.S. Environmental Protection Agency, Region III

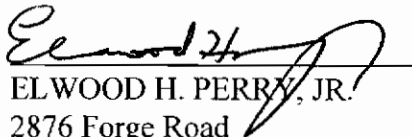
Dated: 10/18/07



WILLIAM C. EARLY
Regional Counsel
U.S. Environmental Protection Agency, Region III


Dated: 10/17/07

FOR DEFENDANT ELWOOD H. PERRY, JR.


ELWOOD H. PERRY, JR.
2876 Forge Road
Toano, VA 23168
(757) 869-0001

Dated: Sept. 27, 2007

FOR DEFENDANT FERRELL'S BACKHOE SERVICE, INC.


PAMELA FERRELL, Secretary
Ferrell's Backhoe Service, Inc.
1160 Chapanoake Rd.
Hertford, NC 27944
(252) 264-2175

Dated: 10-3-07